

TESTIMONY OF ROBERT M. KRUGER ON BEHALF OF THE BUSINESS  
SOFTWARE ALLIANCE, THE INTERACTIVE DIGITAL SOFTWARE  
ASSOCIATION, THE MOTION PICTURE ASSOCIATION OF AMERICA, THE  
RECORDING INDUSTRY ASSOCIATION OF AMERICA AND THE SOFTWARE &  
INFORMATION INDUSTRY ASSOCIATION

BEFORE THE UNITED STATES SENTENCING COMMISSION  
MARCH 23, 2000

Thank you for the opportunity to testify on the amendments to the sentencing guidelines currently being considered by the Commission pursuant to the directive contained in the "No Electronic Theft Act of 1997," Pub. L. 105-147 (The NET Act).

I am Robert M. Kruger, Vice President of Enforcement at the Business Software Alliance (BSA), a trade association whose members include the leading publishers of productivity software in the United States. I am testifying today on behalf of BSA and four other associations that share a common interest in protecting the copyrights of their members against infringement:

- The Interactive Digital Software Association (IDSA), whose members publish more than 90% of the entertainment software sold in the U.S.
- The Motion Picture Association of America (MPAA), whose members produce approximately 90% of filmed entertainment in the theatrical, television and home video markets
- The Recording Industry Association of America (RIAA), whose members produce over 90% of the legitimate sound recordings, records, CDs and audio tapes sold in the U.S. and
- The Software Industry & Information Association (SIIA), the principal trade association for the software and digital content industry.

The individuals behind the businesses that make up these associations create some of the most useful, productive, entertaining and valued products in the world. In recent years, their collective output has become America's fastest-growing economic asset, representing 4.3% of the annual gross domestic product (GDP). Together, the software, motion picture and recording industries make greater value-added contributions to our nation's economy and employ more individuals than any other manufacturing sector and rank first in foreign sales and exports. Artists, performers, programmers, consumers, taxpayers, wage-earners, entrepreneurs, investors, music lovers, film buffs and many, many others all benefit from the continued economic vitality of the U.S. copyright community.

But these benefits -- and the future of these industries -- have been placed at risk by the increasing incidence and scope of intellectual property crime. Piracy has long plagued the copyright community, depriving creators of a return on their investment and stifling growth by destroying the incentives for the creation of new works. In recent years, however, the problem has grown much more severe as technological advances have dramatically increased the ability to reproduce and distribute copyrighted works. Physical distribution channels have been invaded by sophisticated counterfeiting operations, a growing number of which involve organized -- and dangerous -- criminal elements. On the Internet, auction site vendors, web site operators and pirate groups distribute unauthorized copies of copyrighted works on a scale that threatens to dwarf the estimated \$20-\$22 billion in revenue lost to piracy by "traditional" means each year.

Much has been done to address this problem through education, technological measures, civil enforcement and other means. There is, however, a public policy consensus, reflected in the NET Act directive, that the deterrence attainable through criminal prosecution is an essential component of an effective solution. In order to achieve compliance with this country's copyright laws, the public must understand and expect that meaningful sanctions will be imposed against those who engage in activities that rise to the level of criminal violations of the law.

With so much at stake, our associations have endeavored to be fully responsive as Congress and the Commission have sought our input on enhancing the sentencing guidelines. We have testified to our experience before Congress and, in letters dated January 26, 2000 and March 10, 2000, submitted written comments to the Commission on the various options for amending the guidelines under consideration. As those options have been reformulated and refined, our views have reflected several basic principles that we believe are consistent with both the relevant policy objectives and the important institutional considerations underlying the guidelines themselves:

- The sentencing outcome under the amended guideline must be certain and predictable. The inclusion of a provision that would allow for an open-ended departure to undo the sentence arrived at under the guideline - such as that contained in certain options under consideration -- would be at odds with these objectives. Similarly, qualifying the methodology for arriving at the economic value of the infringing activity with words like "usually" might well lead to protracted sentencing hearings in which angling for an exception displaces adherence to a rule.
- An increase in the base offense level is appropriate to establish parity in the treatment of criminal copyright infringement and to create deterrence. Under the existing guidelines, there is no adjustment available to account for the higher level of criminal culpability that accompanies other offenses involving "more than minimal planning." This omission results in unintentionally treating intellectual property offenses as less serious than equivalent offenses in the fraud or theft area even though their economic impact is at least equally adverse. A compensating increase in the base offense level is justified by the fact that most criminal copyright infringements involve planning - and execution - of an often extensive and sophisticated nature.

- The economic harm is not eliminated or necessarily mitigated if the infringer doesn't profit financially or charges a low price for the infringing articles. We acknowledge that there is not always a one-to-one relationship between market displacement and the distribution of infringing articles. It is, however, perverse to assume that the lower a good is priced, the less likely it will displace a sale. Indeed, it may be more logical to assume that infringers who price their wares below those of their competitors in the black market actually capture a larger share of the trade in pirated goods. Moreover, the sale of pirated product can harm copyright owners indirectly, through reputational injury, through the destruction of legitimate channels of distribution and by contributing to an overall lack of respect for and adherence to intellectual property laws. Adopting a guideline that focuses solely on the displaced sales equation overlooks these harms and may fall short of providing the deterrence recognized by Congress as critical to this undertaking.
- The unique injury to the right-owner from pre-release product warrants separate treatment under the guidelines. As we have noted previously, unauthorized reproduction, distribution, performance or display of a copyrighted work prior to the time that the owner is prepared to release that product into the open market works a distinctive harm to the copyright owners. The availability of infringing product prior to the commercial release of a work can cause significant lost sales and damage to the market. Often, the pre-released item is a reproduction of a work in progress that is not ready for market.
- The determination of economic value should be based upon the retail price of the infringed-upon articles wherever digital or electronic reproductions are involved. Whatever special treatment should be given to infringing articles that are inferior in quality to genuine goods, the guidelines should embody the recognition that there is a technological identity between the quality of genuine goods and infringing works that are digitally or electronically reproduced. Functionally, an unauthorized digital copy of a software program is no different than the legitimate article. This functional equivalence is the basis for the suggestions we have made to include appropriate language in options that seek to treat "inferior goods" in a disparate manner.
- The guidelines should empower courts to punish more severely those criminal copyright offenses that involve other dangerous criminal activity. The guidelines ought to attach greater criminal culpability to large scale, organized infringement, especially when it promotes or fosters other adverse societal consequences. The increased involvement of organized criminal elements in copyright infringement presents one such scenario. Accordingly, we have supported the inclusion of a special offense characteristic, such as that presently contained in Option 2 (as presented in both options papers made available to the public), that would increase the offense level where there is a risk of bodily injury to others. Such an adjustment might, for example, come into play where the offenders are using weapons in the course of their activities.

We continue to believe that, modified in minor respects, Option 4 – as presented in the

paper provided by the Commission staff on February 21 – most closely embodies these principles, is most consistent with the institutional aims behind the sentencing guidelines and is most faithful to the Congressional goal of achieving effective deterrence.

We appreciate the extent to which the Commission, and in particular its staff, has invited the copyright community, as direct victims of intellectual property crime, to share its experiences and insights throughout its consideration of this important matter. We hope we have been of assistance to the Commission as it seeks to complete its work. We stand ready to answer questions and to continue to assist the Commission in any way possible.